In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 351

C. M. BAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals

for the Ninth Circuit

and

SUPPORTING BRIEF.

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Honorable the Associate Justices of the Supreme Court of the United States:

Your petitioner, C. M. Bair, respectfully presents his petition for a writ of *certiorari* to review a deci-

sion and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, and thereby respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

I.

PROCEEDINGS IN COURT OF APPEALS.

On May 28, 1940, by opinion (R. 112-117) and judgment (R. 117-118) the Circuit Court of Appeals below affirmed two orders (R. 37-40; 79) of the United States district court for the district of Montana, requiring the appearance, under Rule 69(a), *Federal Rules of Civil Procedure,* and Section 9454, *Revised Codes of Montana,* 1935 (R. 75-78; App., pp. i-iii) of the petitioner before a referee for examination in proceedings supplementary to execution and in aid of judgment, and, pending such proceedings, enjoining the petitioner from disposing of any of his property not exempt from execution (R. 40).

Thereafter in time a petition for rehearing was filed, and on June 29, 1940, denied (R. 118).

On July 2, 1940, on application duly made, the mandate below was regularly stayed first to August 5, 1940 (R. 119), and subsequently to August 24, 1940.

II.

STATEMENT OF CASE.

On June 8, 1939, the United States District Court for Montana on affidavit presented (R. 33-36) made its *ex parte* order (R. 37-40) under Rule 69(a), *Federal Rules of Civil Procedure* and Section 9454, *Revised Codes of Montana,* 1935 (App., p. i) for the examination of the petitioner as the judgment debtor under a judgment (R. 2-4) theretofore recovered on September 14, 1938 (R. 4), in the same court by the respondent against the petitioner for $100,057.95, principal, interest, attorneys' fees and costs (R. 3-4). Execution (R. 31-32) had previously been returned (R. 4-30) unsatisfied.

Specifically, the order of examination named a referee to conduct the proceedings (R. 39) with power (R. 39)

> "* * * to fix the time and place or times and places of such hearing as may be necessary and to conduct such hearing or hearings in any county within the State of Montana at such places therein as may seem fitting and proper to said referee."

Specifically, the petitioner was ordered to (R. 40)

> "* * * appear before the said referee at the time or times and place or places to be designated by said referee, and then and there to make true answers under oath concerning his property; * * *"

Accordingly, the referee fixed the examination of the petitioner and certain others, denominated witnesses,

for a time and place within the county of the petitioner's residence in Montana (R. 42-43), the examination of other such witnesses in another county of the state at a different time (R. 43), and the examination of still others in a third county on yet another day (R. 43-44).

By timely motion the petitioner challenged the order for his examination (R. 54-57); this motion with another to vacate certain subpoenas issued (R. 63-67), not in question here, was heard in open court (R. 73-74), and thereafter on October 3, 1939, denied by order (R. 79) and written opinion (R. 75-79).

Appeals were timely taken thereafter from both the order for examination of June 8, 1939 (R. 80), and the further order entered October 3, 1939, denying the motion to vacate (R. 84). Supersedeas was granted (R. 71-83; 85-88).

Affirmance in the Circuit Court of Appeals for the Ninth Circuit followed as noted above.

B.

BASIS FOR THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a), *Judicial Code of the United States*, as amended, Section 347, Title 28, *United States Code*, and within the time limited by Section 350, Title 28, *United States Code*.

C.

QUESTION PRESENTED BY RECORD.

The question presented by this record is whether a federal district court may judicially amend Rule 69(a), *Federal Rules of Civil Procedure,* by fashioning a practice in supplementary proceedings unknown to either the state codes or the federal rules and sanctioning an examination thereby of a judgment debtor under color of the state practice and procedure, but wholly at variance with the applicable state statutes and decision of its court of last resort.

D.

REASONS FOR GRANTING WRIT OF CERTIORARI.

A writ of certiorari should be granted herein to review the judgment and decision of the Circuit Court of Appeals below for these reasons:

(1) The Circuit Court of Appeals has decided an important question of local law in a way certainly in conflict with applicable local decisions, and has therefore clearly misapplied Rule 69(a), *Federal Rules of Civil Procedure,* to-wit:

(a) The state practice and procedure has been invoked under Sections 9454, 9458, *Revised Codes of Montana,* 1935 (R. 78-79), which specify in terms that the debtor's examination shall be held in the county of his residence at a time and place specified by the judge in the order. The state court of last resort has held in *In re Downey,* 31 Mont. 441, particularly at

444-445, interpreting Section 9454, that no order should be entered nor course of procedure adopted not authorized by the statute. But the Circuit Court of Appeals has ruled in effect that a federal district court following the state practice and procedure is, nevertheless, bound neither by this statute nor this decision of the state court, and may authorize multiple examinations in any county of the state.

(b) In the state practice the referee authorized by Section 9454 is appointed pursuant to Sections 9374, 9375 and 9376, *Revised Codes of Montana,* 1935 (App., pp. ii-iii) providing for a reference first upon the consent or agreement of the parties. Failing in this, the judge then may appoint, but not otherwise, a resident of the county where the proceeding is triable. The Circuit Court of Appeals has held, however, that, although the state practice and procedure have been invoked, the appointment of the referee for which provision is there made need not follow the local practice or statutes at all.

(c) In the state practice third persons suspected of concealing property of the judgment debtor or indebted to him may be examined only under Section 9457, *Revised Codes of Montana,* 1935 (App. p. i), pursuant to order made upon the affidavit required by that section. No such showing by affidavit or otherwise confessedly has been made to sustain the order here assailed. Yet the Circuit Court of Appeals authorizes an examination throughout the state of Montana of third persons in all particulars as though full

compliance were had with Section 9457, all of which is wholly contrary to any known state practice.

(2) The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, to-wit:

(a) Rule 69(a), *Federal Rules of Civil Procedure*, provides for the examination of a judgment debtor, under the alternative here elected by the respondent, in the manner provided by the practice of the state in which the district court is held. But the Circuit Court of Appeals has ruled in effect that the substance of this rule, and hence by implication of the other rules of procedure promulgated by this Court, may be varied and judicially amended at the discretion of a district court.

(3) The Circuit Court of Appeals has so far sanctioned a departure by the federal district court for Montana from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States, to-wit:

(a) In substance the Circuit Court of Appeals under Rule 69(a), *Federal Rules of Civil Procedure*, has authorized a plain departure from the known practice of the state and from the unambiguous language of the state statutes invoked. For Section 9454, *Revised Codes of Montana*, 1935, as interpreted by the Supreme Court of Montana, in *In re Downey*, 31 Mont. 441, at 444-445, authorizes an examination of the judg-

ment debtor only in the county of his residence at a time and place specified in the order of the judge therefor, and implicitly forbids an order for multiple examinations, as at bar, at the discretion of the referee in any county of the state, or the examination of third persons generally throughout the state, short of compliance with Section 9457 of the state codes.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted as prayed.

Dated, August 16, 1940.

HORACE S. DAVIS,
STERLING M. WOOD,
Counsel for Petitioner.

In the Supreme Court
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OCTOBER TERM, 1940

No.

C. M. BAIR,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking corporation),
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit appears in full in the record (R. 112-117), and has been reported in *Bair v. Bank of America National Trust & Savings Association* (C.C.A., 9th Cir.), 112 Fed. (2d) 247.

The opinion of the district court likewise appears in the record (R. 75-79); it has not been reported elsewhere.

II.

JURISDICTION OF THE SUPREME COURT.

The basis upon which this Court's jurisdiction is invoked is already set out in the accompanying petition under subdivision B.

III.

STATEMENT OF CASE.

The essential facts of the case have been fully stated in the accompanying petition under subdivision A, II. No repetition will be indulged here. Any additional facts which may become pertinent in the course of the argument made below will be specifically noted there.

IV.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in holding and deciding that under Rule 69(a), *Federal Rules of Civil Procedure,* a judgment creditor may proceed upon the authority of the state practice and procedure to examine the judgment debtor, yet depart substantially

and in effect entirely from the plain requirements of the state statutes invoked and the plain holdings of the state court of last resort, which are applicable.

V.

SUMMARY OF ARGUMENT.

The petitioner contends:

(1) That Rule 69(a) requires the same substantial compliance with the state practice and procedure, when invoked, as though the proceedings were taken in the state court.

(2) That the state practice in Montana here in question is neither relaxed nor modified by federal statute or rule of procedure.

(3) But that the order for the petitioner's examination departs wholly and substantially from the Montana state practice and procedure:

(a) In that Section 9454, *Revised Codes of Montana,* 1935 (App., p. i), invoked below, requires the order for examination itself to specify a time and place for examination in the county of the debtor's residence. Yet the order challenged here permits the referee to fix times and places indiscriminately through out the whole state of Montana in his discretion. For this error specified and argued below the Court of Appeals should have reversed.

(b) In that Sections 9374-9376, *Revised Codes of Montana,* 1935 (App., pp. ii-iii), defining the state

practice afford an opportunity, before a referee may be named by the court, for a judgment debtor to consent to or agree upon some fit person as such. Failing to secure such consent or agreement the judge may then designate, but only a resident of the county where the proceeding is triable. This state practice was wholly disregarded. For this error specified and argued below the Court of Appeals should have reversed.

(c) In that Sections 9454 and 9458, *Revised Codes of Montana,* 1935 (App., pp. i, ii), do not authorize the examination of third persons indiscriminately throughout the state of Montana short of compliance, in addition, with Section 9457 of the same codes (App., p. i), which controls the examination of those suspected of concealing the debtor's assets, etc. This state practice was also wholly disregarded. For this error specified and argued below the Court of Appeals should have reversed.

To the contrary the Circuit Court of Appeals erroneously held, in substance,

(a) That under Section 9454, *Revised Codes of Montana,* 1935 (App., p. i), the federal district court need not itself fix a time and place for the debtor's examination within the county of his residence, but may empower the referee designated to fix times and places indiscriminately in his discretion throughout the entire state of Montana.

(b) That the referee authorized by Section 9454, of the state codes need not be appointed or qualified

under the state practice and procedure nor in accord with the state statutes, but perforce of Rule 53, *Federal Rules of Civil Procedure.*

(c) That persons other than the judgment debtor may be examined generally in any county of the State of Montana as witnesses under Section 9458, *Revised Codes of Montana,* 1935 (App., p. ii), without compliance at all with Section 9457, of the same codes (App., p. i), controlling in the state practice the examination of third parties.

VI.

ARGUMENT.

FOREWORD.

The petitioner's argument will present his contentions in the order of their statement in the petition. Rule 69(a) mentioned appears *in litteris* in the appendix (App., p. iii); there the pertinent portions have been italicized.

(1) WHEN THE STATE PRACTICE AND PROCEDURE IS CHOSEN THE STATE STATUTES AND DECISIONS CONTROL.

It has been the uniform rule of the federal courts that where a federal statute or rule of court adopts a state rule of practice or procedure, whether appearing in the state statutes or written in the decisions of the state court of last resort, the construction given by the highest state courts governs. Specifically, such

has been the practice in the federal courts where the state procedure has been adopted in supplementary proceedings, particularly under Section 727, Title 28, *United States Code,* which preceded Rule 69(a) now in force.

See:

Atlantic etc. Co. v. Hopkins, 94 U.S. 11, 24 L. ed. 48;

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397;

Supervisors of Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771;

Sowles v. Witters (C.C., Vt.), 55 Fed. 159;

Johnson v. Crawford & Yothers (C.C., Pa.), 154 Fed. 761;

3 *Moore's Fed. Prac.* 3368-3371, sec. 69.02, and citations in footnotes.

A fair reading of Rule 69(a) accords with the holding of these authorities. They are, moreover, in full accord with the spirit and the letter of the decision of this Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 Sup. Ct. Rep. 817. Particularly, the contentions of the petitioner accord with the latest pronouncement of this Court in the *Tompkins* case that the law of a state is found in (1) the statutes of the state, and (2) the decisions of its court of last resort.

Compare *Matos v. Hermanos,* 300 U.S. 429, 81 L. ed. 728, 57 Sup. Ct. Rep. 529, where pat comment is made by this Bench upon the impropriety inhering in the

construction by a federal court of a state statute which is at variance with the interpretation placed thereon by the courts of the state.

The respondent has elected to examine the petitioner in accordance with the state practice and procedure; it follows that it is bound to follow the state statutes and decisions, unless within the limits of Rule 69(a) an applicable statute of the United States governs.

(2) THERE IS NO APPLICABLE STATUTE OF THE UNITED STATES WHICH IS CONTROLLING HERE.

No federal statute within the exception made by Rule 69(a) has been relied upon by either the district court (R. 75-79) or the Court of Appeals (R. 112-117). None has been suggested by counsel for the respondents.

Rule 53, *Federal Rules of Civil Procedure,* governing references ~~in~~ the federal practice has been noted (R. 79; 116) as justification for the procedure followed in the appointment of the referee (R. 39). But there has been no hint that in this federal rule was to be found any authority for the construction placed upon Section 9454 of the state codes and its companion Sections 9457 and 9458.

Speaking of these Montana statutes the opinion of the Court of Appeals is explicit (R. 114):

> "Ample authority is found in these statutes and in the rule (Rule 69(a)) for the order appealed from, and for the steps taken by the referee thereunder" (interpolation ours).

So, too, the district court said (R. 76):

> "* * * The plaintiff has elected to proceed in accordance with the practice and procedure of the state, and the first remedy therein provided * * *".

Again (R. 77):

> "* * * It seems to the Court under the facts presented here that the judgment creditor has selected remedies provided by the state statute in Sections 9454 and 9458 that are ample and sufficient for the purposes intended."

It follows upon the record at bar (a) that no applicable federal statute governs the proceedings here challenged, (b) that no governing federal statute is relied upon in either court below as the foundation for their decisions, and (c) that there is in truth no applicable federal statute at all.

There is presented solely the meaning of the state statutes as interpreted by the Supreme Court of the state of Montana.

(3) THE ORDER CHALLENGED (R. 37-40) IS A COMPLETE DEPARTURE FROM THE STATE PRACTICE AND PROCEDURE:

(a) In that it disregards the requirements of Section 9454 of the state codes (App., p. i) that therein there be specified a time and place of examination in the county of the debtor's residence.

This departure is conceded in both opinions below (R. 79; 115). In the district court the omission is justified by reliance upon Rule 53(d)(1) of the federal rules. But here it is the federal and not the state

practice to which resort is had in the very teeth of the plain language of Rule 69(a).

Hence, apparently the Circuit Court of Appeals shifts to interpretation of the state statutes buttressed by analogy only to the federal rules and to an old decision of a New York trial court reported as *Redmond v. Goldsmith* (1879), 2 N.Y. Monthly Law Bulletin 19 (R. 115) affirming the Court of Appeals grounds upon "substantial compliance with the statute where the time and place are fixed by the referee's order in conformity with the law" (R. 115).

But neither the reason advanced in the district court nor the analogy found pertinent in the Court of Appeals is the law of the state. We join issue sharply upon the statement in the last opinion below that "no local decisions bearing immediately upon the subject are cited, * * *" (R. 115).

There and as well in the court of first instance counsel for the petitioner cited and relied upon the decision of the Montana Supreme Court in *In re Downey,* 31 Mont. 441, 78 Pac. 772, where it is written of what is now Section 9454 of the *Montana Codes* (31 Mont. 445):

> "* * * The court must look to it (Section 9454) for authority, and should make no order nor *adopt a course of procedure not authorized by it* * * *" (italics and interpolation supplied).

Such is the law of the state governing the practice in the state courts under Section 9454 to this day.

That statute plainly authorizes only an order specifying for his examination a time and place in the county of the petitioner's residence. That statute does not authorize an order, as at bar, delegating to a referee the power to select successive times and places for examination indiscriminately as he may choose throughout all the fifty-six counties of the state.

On order under Section 9454, as interpreted by the Montana Supreme Court in the *Downey* case, for an examination of the petitioner at a time and place specified therein in Meagher County, Montana, where he resides (R. 36), is the only order known to the practice of the state. That practice as delineated in the statute and decision cited does not countenance the order here challenged nor the consistent interpretation thereof by the referee in his further directions (R. 42-44) for examinations beginning with the petitioner and certain others in Meagher County, Montana, on a day certain (R. 42-43), and continuing to Musselshell County, Montana (R. 43), and thereafter to Yellowstone County, Montana (R. 43-44), on successive days.

That is, Section 9454 of the state practice, which is in question, does not sustain in any particular any of these orders. The district court expressly concedes as much (R. 79); the Court of Appeals, by implication (R. 115). Both justify by resort to a practice not that of the state: the district court, by the citation of Rule 53(d)(1) of the federal rules (R. 79); the Court of Appeals by the added analogy of what is assumed to be the ancient New York practice (R. 115).

It is clear (a) that in the particulars here assailed the challenged order departs entirely from the state practice, (b) that thereby in effect Rule 69(a) of the federal rules is amended to read, in conclusion, "in the manner provided by the practice of the state in which the district court is held, but only in so far as the district court shall choose", and (c) that the departure from the state practice is expressly admitted, the amendment of the federal rules certainly established.

(b) In that the referee designated was appointed in complete disregard of the state practice and procedure.

Sections 9374, 9375 and 9376, *Revised Codes of Montana,* 1935 (App., pp. ii-iii) govern the state practice and procedure in the appointment of a referee under Section 9454. Specifically, these statutes afford the judgment debtor an opportunity to consent to some suitable referee before an appointment may be made on the motion of the adversary party. Even then the appointee must be a resident of the county where the proceeding is triable, viz.: in this case, of the county of the petitioner's residence, where under Section 9454 his examination must be held.

There is no dissent from this exposition of the state practice, as we read the opinions below (R. 75-79; 112-117) and interpret the argument of opposing counsel. Rather at this point the shift is to Rule 53, *Federal Rules of Civil Procedure* (R. 116), where provision is made in the federal practice for the appointment of a master or referee.

But the procedure there detailed is not the practice of the state which the alternative chosen under Rule 69(a) offers. Moreover, the state practice act is complete in its provision for the designation, qualification and functioning of a referee.

The need is not that under Section 9454 of the state codes a referee must be appointed in some way. Rather under Rule 69(a) the choice given of the state practice and procedure definitely defining how the appointment shall be made has been accepted by the respondent.

That practice provided (1) for the examination of the judgment debtor under Section 9454 before a referee, (2) appointed, likewise consistent with the state practice, under Sections 9374, 9375 and 9376 of the state codes. There is not hiatus.

That is, there is no room for resort to the federal practice in the appointment of a referee; the state procedure precisely points out here the course delimited by the state law. That state procedure applies in its entirety certainly, or not at all. Certainly Rule 69(a) does not suggest a course in part the practice of the state, in part something wholly different.

The resort in such circumstances to the federal rules is a complete and undenied departure from the state practice. It is at the same time an inexcusable violation of Rule 69(a) itself, which in so far as this record goes makes the practice of the state the rule of decision, says nothing of the federal practice at all.

Counsel for the petitioner appreciate that the departures here assailed, erroneous though they be, alone furnish no basis for granting the writ prayed for. Cumulated as they are, however, with the other vices inhering in the challenged order, there is indicated a studied purpose to sustain an asserted right below in effect to amend at pleasure the rules of procedure promulgated by this Court. In this rests the basis for the exercise of the discretionary jurisdiction of the Supreme Court for the reasons outlined in the foregoing petition.

(c) In that Sections 9454 and 9458, Revised Codes of Montana, 1935 (App., pp. i, ii) do not authorize the examination of third persons indiscriminately throughout the state short of compliance with Section 9457 not here in question.

Stemming from the authority vested in him to conduct hearings in any county of the state (R. 39), the referee has asserted the power to examine without the county of the petitioner's residence other persons, so-called witnesses, at successive times and places (R. 43-44). If *witnesses* these persons be, then under Section 9454 their examination as such properly belongs in the county where the petitioner resides and himself must be examined.

For such is again the plain language of Section 9454; opposing counsel and the courts below disclaim an appeal elsewhere (R. 78-79, 113-114). The affidavit which initiated these proceedings (R. 33-36) is drawn to satisfy the demands of Section 9454, meets none of the requirements of Section 9457 (App. pp.

i-ii), which alone designs a remedy to reach the debtor's assets in the hands of others.

In truth, the real purpose of the respondent's counsel is not concealed at all by the lip service paid by them to Sections 9454 and 9458. They propose to examine others than the judgment debtor without limit or restriction, all of which is unmistakably evidenced first by the inexcusable language of the order of reference (R. 39-40), and secondly by the equally unbounded interpretation which the referee has placed thereon by his own order (R. 42-44) and his subpoenas issued thereunder (R. 48-49, 51-52).

Disclosures such as this order and these subpoenas contemplate, calling as they do for the records, accounts and business transactions of others than the judgment debtor, had by them with others than him, lie certainly beyond the utmost limits of Rule 69(a) or Sections 9454, 9458 of the state codes. Such is the express holding, even under the federal rule in question, of the district court in *Burak v. Scott* (D. C., D. Col.), 29 Fed. Sup. 775.

But here it is the state practice in Montana which governs the proceedings in question. The state practice is plain, indeed. The case at bar the more aggravated.

Both Sections 9454 and 9457 are statutory substitutes for the creditor's bill of the old equity practice. Such has been held in

In re Downey, 31 Mont. 441, 78 Pac. 772;

Missoula Trust & Savings Bank v. Northwestern Abstract & Title Assurance Co., 61 Mont. 370, 203 Pac. 854.

Precisely as a creditor's bill in equity requires a foundation in fact to authorize the discovery prayed, so within the rule of these decisions in Montana there must be of record a showing by affidavit, or otherwise, sufficient in substance to satisfy the predicate of the statute invoked. Else the examination contemplated by that statute fails.

Conversely, an order of the judge which without the requisite foundation in fact undertakes indirectly to set afoot an examination such as Section 9457 alone contemplates is not only erroneous in the state practice; it should be wholly void. Whatever may be the rule elsewhere it is entirely clear that the statutes of the state of Montana authorize no "fishing expedition". To this extent perhaps they have not yet been liberalized; they are, nevertheless, the rule of decision here.

It is not denied that in the state practice and consistent with the state statutes as in the old equity practice an examination into the affairs of others than the judgment debtor may not be had unless the factual basis required by Section 9457 first be laid.

Compare

Huntington v. Saunders, et al., 120 U. S. 78, 30 L. ed. 580.

Moreover, this undenied distinction in the state practice between an examination of the judgment debtor under Section 9454 and of third persons under Section 9457 makes for the certain condemnation of the effort launched at bar to interrogate witnesses indiscriminately by authority of Section 9458. This latter section may not be used as a convenient device for avoiding the factual requirements of Section 9457. The courts below, as we have pointed out many times heretofore, disclaim any purpose to authorize any such result. The record is abundant proof, however, that just such a result has been accomplished.

It is idle to speak on this record of an examination of the judgment debtor under Section 9454, while discussing the examinations proposed for third persons elsewhere than in the county of the debtor's residence and independently of the examination of the debtor himself.

The order challenged is, in truth, an unblushing attempt to accomplish in the name of the state practice what that practice in Montana emphatically forbids. The examination of the judgment debtor himself is subordinated to the inquisition directed at others. An order prayed under color of Section 9454 is fashioned into a weapon which the Montana practice designs only after compliance with Section 9457.

VII.

CONCLUSION.

In reaching its erroneous conclusions as demonstrated above the Court of Appeals has plainly decided important questions of local law by construing Section 9454 and its companion sections in the Montana codes, and has done so certainly in conflict with the applicable decision of the Montana Supreme Court in the *Downey* case cited. By its affirmance of the orders of the district court the Court of Appeals has sanctioned so flagrant a departure from the accepted and usual course of judicial proceedings, plainly defined as that course is in the statutes of the state and the decisions of its Supreme Court, as to call for an exercise of the power of supervision of this Court.

Else again, the decision in the *Tompkins* case is blunted, there is once more a turning back to the repudiated doctrine of *Swift v. Tyson.*

There is, moreover, implicit in the rulings below an important question of federal law. The pertinent portion of Rule 69(a) of the federal rules specifies with particularity that the petitioner's examination shall be conducted "in the manner provided by the practice of the state in which the district court is held".

May a district court then, when the state procedure is invoked, depart so thoroughly and substantially from the state practice that the course adopted is unrecognizable? Whatever answer is returned, we respectfully submit, the question of federal law involved is of extreme importance.

For the right asserted is in truth the right judicially to amend the rules promulgated by this Court to govern civil procedings in the district courts. A question of this magnitude should be settled here where the rules themselves have their origin.

Accordingly, a writ of certiorari out of this Court is prayed to review the judgment and decision below of the Circuit Court of Appeals for the Ninth Circuit.

Dated, August 16, 1940.

HORACE S. DAVIS,
STERLING M. WOOD,
Counsel for Petitioner.

(Appendix Follows.)

SECTIONS 9454, 9457, 9458, 9374, 9375, 9376, REVISED CODES OF MONTANA, 1935.

9454. Debtor required to answer concerning his property, when. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this state, to the sheriff of the county where the judgment-roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

9457. Examination of debtors of judgment debtor, or of those having property belonging to him. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

9458. Witnesses required to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

9374. Reference ordered upon agreement of parties, in what cases. A reference may be ordered upon the agreement of the parties, filed with the clerk or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or law and to report a finding and judgment thereon;

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

9375. Reference ordered on motion, in what cases. When the parties do not consent, the court may, upon the application of either, or of his own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side, in which the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

4. When it is necessary for the information of the court in a special proceeding.

9376. Number of referees, qualifications, etc. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection.

RULE 69(a), FEDERAL RULES OF CIVIL PROCEDURE.

Rule 69. Execution.

(a) *IN GENERAL.* Process to enforce a judgment for the payment of money shall be a writ of execution unless the court directs otherwise. The *procedure* on execution, *in proceedings supplementary to and in aid of a judgment,* and *in proceedings on and in aid of execution* shall be *in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought,* except that any statute of the United States governs to the extent that it is applicable. In *aid* of the *judgment* or *execution* the *judgment creditor* or his successor in interest when that interest appears of record, *may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.* (Italics supplied.)

Due service and receipt of a copy of the within is hereby admitted

this.....day of August, 1940.

.....

.....

.....

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 351

C. M. BAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING CORPORATION).

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 351

C. M. BAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING CORPORATION).

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Honorable the Associate Justices of the Supreme Court of the United States:

Your respondent, Bank of America National Trust and Savings Association, respectfully presents this brief in opposition to petition for writ of certiorari herein, and thereby respectfully shows:

Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the United States Dis-

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NOTE: All matter in italics herein and all underlining is by respondent's counsel.

trict Court for the District of Montana against petitioner, and out of which judgment the supplementary proceedings arose, is reported in *Bank of America, etc.*, v. *Bair*, 106 F. (2d) 794.

The opinion of the Circuit Court of Appeals for the Ninth Circuit affirming the order of the United States District Court for the District of Montana upholding the validity of the supplementary proceedings is reported in *Bair* v. *Bank of America, etc.*, 112 F. (2d) 247.

A.

Statement of the Case.

Because the statement of the case presented upon this application contained in petitioner's petition (pages 3-4 and brief, page 10) omits therefrom certain essential details appearing in the record, and in order to give this Court a full picture of the facts and circumstances surrounding the actions of the District Court (sought to be reviewed through the judgment of the Circuit Court of Appeals) we submit the following summary:

On September 14, 1938, the respondent here recovered judgment in the District Court of the United States for the District of Montana, against the appellant, in the total amount of $100,057.95 (R. 2-4). This judgment was affirmed upon appeal to the Circuit Court of Appeals for the Ninth Circuit (106 F. (2d) 794).

Shortly after entry of this judgment, on November 26, 1938, the Clerk of the District Court duly issued a writ of execution, directed to the United States Marshal for the District of Montana, and directing him to make the sum due upon the judgment, together with interest and costs out of the personal property of the debtor or out of real property belonging to the debtor in the counties of Meagher, Wheatland, Musselshell or Yellowstone within the State of Mon-

tana, where abstracts of the Federal Court judgment had been filed (R. 31-32). This writ, together with a detailed praecipe signed by the attorneys for the plaintiff below (R. 27-30) was delivered to a Deputy of the United States Marshal on November 26, 1938 (R. 5) and thereafter, on January 24, 1939, the said writ of execution was returned to the Clerk of the District Court by the Marshal together with the Marshal's return of what had been done thereon (R. 4-32).

The Marshal's return shows service of notices of garnishment, pursuant to the writ and the said praecipe upon the following corporations and persons: First National Bank of White Sulphur Springs, Stockmens Bank of Martinsdale, Mary Bair (wife of debtor), Continental National Bank of Harlowton, Bair-Collins Company, Miners' & Merchants' Bank of Roundup, Montana, F. V. H. Collins, The Bair Co., Marguerite Bair (daughter of judgment debtor), Alberta M. Bair (daughter of judgment debtor), The Bair Co. (second levy), Security Trust and Savings Bank of Billings, Montana, Montana National Bank of Billings, The Midland National Bank, Billings (R. 5).

In each case of garnishment the notice served was in the same form, a copy of which appears at page 10 of the printed Transcript of Record herein. All of the garnishees served made written and signed returns stating that none of them was indebted to the judgment debtor (R. 11-22).

Furthermore, the Deputy Marshal served notice of levy of execution on corporate stock upon both the Bair-Collins Company and The Bair Co. (R. 6), and the notices of such levies are set out on pages 19 and 20 of the Transcript of Record herein. To the levy served upon it, the Bair-Collins Company made answer the judgment debtor then held one certificate of the corporation's stock for one hundred and twenty-five shares of such stock (R. 20), and similarly The Bair Co. made return that the judgment debtor owned Stock

Certificate No. 42 of the company for one hundred shares of its capital stock (R. 22). These shares of stock were the only property or assets of the judgment debtor discovered by the Marshal upon the attempted levy of execution.

Following these returns, and after posting notices of execution sales (R. 7-8) the Deputy Marshal sold at public sale on January 13, 1939, at Billings the one hundred shares of capital stock of The Bair Co. owned by the debtor which were purchased by F. V. H. Collins for the total sum of $2,550.00 and upon the same day at Roundup, Montana, the one hundred twenty-five shares of stock in the Bair-Collins Company owned by the debtor were sold at public sale for the total price of $3,125.00 which was bid by the judgment creditor (R. 8-9). Certificates of sale were issued to the respective purchasers in due form (R. 9 and 23-26). The net proceeds of the levies and sales, to the judgment creditor, was $5,561.50 (R. 10).

It is to be noted that none of the answers given to the Marshal upon the service of notices of garnishment was made under oath (R. 11-20). Of the persons and corporations answering, Mary Bair, Alberta Bair and Marguerite Bair were members of the debtor's immediate family, being his wife and two daughters; the Bair-Collins Company is a corporation bearing the debtor's name. After this practically fruitless effort to obtain satisfaction of the judgment by resort to levy of execution, and in the face of the denials by persons intimately associated with the debtor that any of them was indebted to him or held any property belonging to him, none of which answers was made under oath, it was immediately apparent that resort must be had to supplementary proceedings in order to make a thorough discovery as to the debtor's assets and thus lay the foundation for further levies of execution upon discovered assets which could be reached by that process, or lay the foundation for

a direct action to set aside any fraudulent conveyances of his property which might be thus disclosed.

Pursuant to Rule 69 of the Federal Rules of Civil Procedure (and Section 9454 Revised Codes of Montana, 1935, if and to the extent that State procedure plays a part) on June 8, 1939, E. G. Toomey, one of the attorneys of record for the judgment creditor, executed an affidavit for supplementary proceedings which was filed that day (R. 33-36). In the affidavit, among other things, it is recited that the judgment creditor recovered the judgment already mentioned, that a correct transcript of said judgment had been filed and docketed in the office of the Clerk of the State District Court of each of the Montana counties of Meagher, Musselshell, Wheatland and Yellowstone. The affidavit further states that the writ of execution, heretofore mentioned, had been issued, and attempted levies thereof had been made by the United States Marshal in the counties of Meagher and elsewhere in Montana, that certain judicial sales heretofore mentioned had occurred and the net amount of $5561.50 realized and credited upon said judgment thereby leaving an unpaid balance, without computation of accrued interest, of $94,496.45 (R. 35). The affidavit further recites that the Deputy Marshal returned that he could find no other or further property of the defendant subject to levy of execution within the State of Montana (R. 7) and it is stated that no other property can be found or reached directly by such levy (R. 35-36). It is further alleged that the judgment was then valid and subsisting, unsatisfied in part, and was then in full force and effect and had never been modified or the force thereof suspended by operation of law or otherwise (R. 36). Finally, it was alleged that the judgment debtor then was a resident of the County of Meagher, State of Montana (R. 36).

Upon presentation of this affidavit to the Honorable Charles N. Pray, United States District Judge, who had

presided at the trial of said cause and rendered judgment therein (R. 2-4), an order was duly given and made on June 8, 1939 and filed the same day which, after giving a resume of the facts stated in the affidavit, read as follows:

> "Now, therefore, it is hereby ordered, and this does order, that W. D. Tipton of the City of Helena, County of Lewis and Clark, State of Montana, be and he is hereby appointed and designated as the referee of the court to conduct and hear all necessary matters in supplementary proceedings in aid of satisfaction of the said plaintiff's judgment herein, and said referee is hereby granted full, general and complete powers to conduct such proceedings in aid of satisfaction of the said plaintiff's judgment herein, and said referee is hereby granted full, general and complete powers to conduct such proceedings with the same authority and effect as if the same were being conducted by a Judge of this Court, including among other powers, the power to subpoena and compel the attendance of all necessary witnesses and to compel such witnesses to testify, the power to fix the time and place or times and places of such hearing as may be necessary and to conduct such hearing or hearings in any county within the State of Montana at such places therein as may seem fitting and proper to said referee.
>
> "And it is further hereby ordered, and this does order, that the said C. M. Bair, defendant and judgment debtor above named, do appear before said referee at the time or times and place or places to be designated by said referee, and then and there to make true answers under oath concerning his property; and said judgment debtor is hereby forbidden, during the pendency of these supplementary proceedings, from disposing of any of his property which is not exempt from execution" (R. 37-40).

On June 14, 1939, W. D. Tipton, the person appointed as referee by said order, duly subscribed a written oath which was filed on June 14, 1939 (R. 40-42). Upon the same date

the referee made a certain order fixing June 21, 1939 and the Court Room of the State District Court in the Court House at White Sulphur Springs in Meagher County, Montana, as the time and place for examination of the judgment debtor and his wife, Mrs. Mary Bair, and his two daughters, Mrs. Marguerite Bair Lamb and Miss Alberta Bair. The order further provided for the examination of F. V. H. Collins and R. D. Chamberlain as witnesses in the Court Room in the Court House at Roundup, Musselshell County, Montana, on June 22, 1939 and for the examination of Sterling M. Wood and R. E. Cooke in the Court Room of the Court House in Billings, Yellowstone County, Montana, on June 23, 1939 (R. 42-44).

A subpoena *ad testificandum* addressed to C. M. Bair, Mrs. Bair, Mrs. Mary Bair, Mrs. Marguerite Bair Lamb and Alberta Bair was issued by the Clerk of the District Court on June 14 and all of these named persons were served with this subpoena to appear as witnesses at White Sulphur Springs, in Meagher County, Montana, together with a copy of the affidavit of E. G. Toomey, a copy of the order of Judge Pray and a copy of the order of the referee, all services being made on June 15, 1939 (R. 45-48). Thus complete service was effected six full days before the time set for the hearing.

A subpoena *duces tecum* was addressed to Sterling M. Wood and R. E. Cooke, attorneys for C. M. Bair, and issued by the Clerk of the District Court on June 14, 1939, commanding them to appear and testify as witnesses at the time fixed in the referee's order at Billings, Yellowstone County, Montana, and to there produce certain books and records of The Bair Co. (R. 48-49). This subpoena was served upon each of the witnesses on June 16, 1939 (R. 50) being seven full days before the date of their examination.

A like subpoena *duces tecum* was addressed to Sterling M. Wood and R. E. Cooke, attorneys for C. M. Bair, and issued

by the Clerk of the District Court on June 14, 1939 commanding them to appear and testify as witnesses at the time fixed in the referee's order at Billings, Yellowstone County, Montana, and to there produce certain books and records of The Bair Co. (R. 48-49). This subpoena was served upon each of the witnesses on June 16, 1939 (R. 50) being seven full days before the date of their examination.

A like subpoena *duces tecum* was addressed to F. V. H. Collins and R. D. Chamberlain and issued by the Clerk of the District Court on June 14, 1939 commanding them to appear and testify as witnesses at the time specified in the referee's order, at Roundup, Montana and to there produce certain books and records of the Bair-Collins Company (R. 51-52). This subpoena was served upon the witness Chamberlain on June 16, 1939 (R. 52-53), six days before the date set for examination of such witnesses. The witness F. V. H. Collins could not be found within the State of Montana and the Marshal made return to that effect (R. 53).

On June 19, 1939 the judgment debtor C. M. Bair filed a separate motion requesting the court to vacate and set aside its order for supplementary proceedings and appointing the referee and further requesting a stay of all proceedings pursuant to said order pending the termination of the motion (R. 54-57). The motion was supported by the affidavit of Horace S. Davis, one of the attorneys for the debtor (R. 58-62).

On the same day, June 19, 1939, a joint motion of C. M. Bair, Mrs. Mary Bair, Mrs. Marguerite Bair Lamb, Alberta Bair, Sterling M. Wood, R. E. Cooke and R. D. Chamberlain was filed, requesting the court to vacate and set aside service of subpoenas upon all persons other than C. M. Bair, to quash the subpoenas themselves *or to define and limit the scope of the examination of the witnesses,* and, finally, a request was made to stay all proceedings had and to be had

pursuant to the reference and the subpoenas mentioned (R. 63-67).

The grounds of these two motions, one by the judgment debtor, Bair, and the other by witnesses, are the same grounds urged against the supplementary proceedings in the Circuit Court of Appeals for the Ninth Circuit, and are, in substance, the objections stated in this Court as reasons for certiorari (Petition, p. 5; Brief of Petitioner, p. 13).

On June 19, 1939, Judge Pray made an order setting the motions for hearing in Billings on June 22, 1939 and directing a stay of all further proceedings until the further order of the court (R. 68-69).

The motions came on for hearing on June 23, 1939, at which time an affidavit of E. G. Toomey, in answer to the affidavit of Mr. Davis, was filed (R. 70-73) and the matter was submitted upon oral argument by counsel and briefs to be thereafter filed (R. 73-74).

On October 3, 1939 an order was made by the Honorable Charles N. Pray overruling and denying the two motions which have been mentioned (R. 75-79). Thereafter the appeals followed to the Circuit Court of Appeals (R. 80).

The judgment debtor concedes that Meagher County is his place of residence (R. 54) and it was in that county the referee ordered the debtor's examination and that of the debtor's family to be had at White Sulphur Springs, the county seat therein (R. 43).

The motion of the witnesses to set aside subpoenas for their examination does not suggest that they are called upon by the referee to be present in any county, other than the county of their respective residences, nor that the books and records sought are not to be found in such counties. It is not suggested that there is any hardship in connection with *production* of books and records at the *places specified* (R. 63-67).

B.

Basis for This Court's Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 (a), Judicial Code of the United States, as amended, Section 347, Title 28, United States Code.

Respondent must concede jurisdiction.

Respondent challenges the sufficiency of the petition, and the record on which it rests, to move the Court to grant certiorari under subdivision 5 of Rule 38 of the Rules of the Supreme Court of the United States.

C.

Question Presented by the Record.

The only question presented by the record before this Court, is:

Is the Order for Supplementary Proceedings and Appointing Referee to Conduct the Same, made by the United States District Court for the District of Montana on June 8, 1939 (R. 37-40) authorized by the new Federal Rules of Civil Procedure, particularly Rule 69, "Execution," and Rule 53, "Masters"?[1]

This order was re-affirmed after the attack against it on the same grounds here urged for petitioner, by the United States District Court for Montana on October 3, 1939 (R. 75-79).

This order was affirmed on appeal after the attack against it on the same grounds here urged for petitioner, by the United States Circuit Court of Appeals for the Ninth Circuit, on May 28, 1940 (R. 112-117; 117-118).

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[1] Counsel for petitioner say the question presented is whether a Federal district court may "judicially amend" Rule 69 (a) etc. (Page 5 of Petition). This method of stating the question merely begs the question.

This order was again upheld against petition for rehearing (R. 118) on June 29, 1940.

D.

Summary of Argument for Respondent.

Under the hearing "Reasons For Granting Writ of Certiorari" (Subdivision D of Petition, pages 5-8) "Specification of Error" (Subdivision IV of Petitioner's Brief, pages 10-11) and "Summary of Argument" (Subdivision V of Petitioner's Brief, pages 11-13) petitioner has re-stated, in several ways, and for the purpose of invoking a plurality of grounds for certiorari, (under subdivision (b) of Paragraph 5, Rule 38 of this court), petitioner's basic charge that the Circuit Court of Appeals has sanctioned a departure by a lower court (the United States District Court for Montana) from the requirements of (Montana) *State statutes* claimed to dominate the practice in the matter of supplementary proceedings to enforce a judgment by that Federal court. The claim of domination and control for State procedure is based on Rule 69 (a) of the Federal Rules of Civil Procedure which reads:

> "Rule 69. Execution.
>
> "(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner

provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held."

Respondent contends:

I. The Montana Statutes do not dominate and are not controlling on the United States District Court for Montana, in the field of supplementary proceedings to enforce a judgment by that court under rule 69 (a).

II. If it be conceded that the State practice and procedure dominates in the field of supplementary proceedings in the case at bar, the statutes of the State furnish ample basis for the orders (R. 37-40; 79) made by the United States District Court for Montana.

E.

ARGUMENT.

I.

The Montana Statutes do not dominate and are not controlling on the United States District Court for Montana, in the field of supplementary proceedings to enforce a judgment by that court under Rule 69(a).

(In Answer to Sections (1) and (2) of Argument found on pages 13-16 of Petitioner's Brief.)

1. The respondent has not elected to examine the petitioner in accordance with the state practice and procedure, as asserted by petitioner (Brief, p. 15). Respondent has proceeded, as it must, under Rule 69 (a) of the new Federal procedure. That rule does not set up any election of remedies for the judgment creditor.

2. The direction of Rule 69 (a) that "the procedure on execution, in proceedings supplementary to and in aid of

judgment, and in proceedings on and in aid of execution shall be *in accordance with* the practice and procedure of the State, in which the district court is held, existing at the time the remedy is sought, *except that any statute of the United States governs to the extent that it is applicable,*" does not drive litigants back into the wilderness of the Conformity Act. "In accordance with" does not mean "in conformity to". It means to be in a state of harmony, not in a state of identity, with State procedure. It is the new rules which are to dominate any procedural area. They must control if they are to serve their national purpose and not succumb to varying State interpretations. (Rule 1, Federal Rules of Civil Procedure). The language in Rule 69 (a) "*except that any statute of the United States governs to the extent that it is applicable*", is remarkable. *Any statute,* of the thousands of statutes of the United States, "to the extent that it is applicable", "governs", all else to the contrary. Not "an applicable statute," not "a statute wholly applicable," not "a statute directly applicable," but "any statute of the United States to the extent, i.e., in whole or in part, directly or indirectly, applicable. That language evinces, at least, determination that the Federal authority shall be supreme.

3. The Federal Rules of Civil Procedure have the effect of law, i.e., of statutes of the United States.

Act of Congress of June 19, 1934, 48 Stat. 1064; U. S. Code, Title 28, Sec. 723 b and c.

United States vs. *American Surety Co.* (E. D. N. Y.) 25 Fed. Supp. 700.

Warren v. *Indian Refining Co.*, 30 Fed. Supp. 281.

4. The United States District Court for Montana resorted to Rule 53 of the Federal Rules of Civil Procedure—the equivalent of a statute of the United States—to aid in en-

forcing supplementary proceedings, through a referee of its own choice (R. 37-40) who was a standing referee in bankruptcy in that district (R. 71).

5. When the trial court invoked Rule 53, that rule "governs", i. e., it excluded, if need be, anything to the contrary in the State statutes, including county residential qualifications of referee personnel, county venue for examination of judgment debtors, terms of courts, order of appointment of referee, terms of referee's order for examination of judgment debtor, and subpœnas to witnesses. (Petitioner assumes conflicts between Federal and State practice which do not exist, as we shall hereafter show.) Rule 53 completely covers the matter of referee's powers, and the rule is to be construed "to secure the just, speedy, and inexpensive determination of every action" (Rule 1). Indeed, in the struggle to clear trails through the wilderness of the Conformity Act, the dominance of applicable Federal statutes as guides was clearly pointed out, as illustrated by the following quotation from 25 C. J. 800, Section 112:

> "Where Congress has by statute pointed out a specific mode of procedure or has legislated generally upon the subject embraced or involved in the proceeding sought to be pursued, such legislation must be followed, although it is opposed to the forms and modes of proceeding prevailing in the State Courts, and even though the provisions of the State statute are more simple and easy of application than the Act of Congress. • • • The provisions of the Conformity Act are in pari materia with other Federal statutes regulating procedure, and all should be construed together and full effect given, as far as possible, to each of them."

Of the many cases cited in the notes to the text quoted above, the following are particularly in point:

Southern Pacific Railway Co. v. *Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942;

Luxton v. *North River Bridge Co.*, 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194; and
Meyer v. *Consolidated Ice Co.*, 163 Fed. 400.

But even when Congress itself has not enacted any specific statute or general law conflicting with the State practice which would otherwise be applicable (as is the case under Rule 53) the Federal Courts are not bound to follow blindly the details of State procedure but may on the contrary reject certain requirements of the State practice which would unwisely encumber the administration of justice, as is illustrated by the following quotation from 25 C. J. 799, Section 111:

> "Extent of Conformity—a. In general. The Conformity Act takes notice of the impossibility of an entire adoption of state modes of proceeding by providing that conformity is required only 'as near as may be'. While this qualification is not to be construed so as to subvert the command of the statute, the Federal Courts may reject any subordinate requirements of State practice which would unwisely encumber the administration of the law or defeat the end of justice in the Federal tribunal."

Many cases are cited in Note 36 in support of the text. In particular note the opinion in *Hein* v. *Westinghouse Air Brake Co.* (C. C. N. D. Ill.), 168 Fed. 766, where the court said, at page 769:

> "(2) The Federal Court may, by standing rule, change subordinate provisions which they deem unsuited to their procedure. (3) In their discretion they may reject collateral or subordinate provisions of the state practice, pleadings, or forms, which tend to obstruct the administration of justice. This they may do in a particular case, presenting unusual features, without making any standing rule. They cannot reject the local system as a whole, or in any substantial part;

but they may dissent with matters of technical form, not affecting substantial rights or operating to the prejudice of a party. They cannot change the local system designed to produce an issue of law or fact (citing authority); but they are not bound to slavishly follow subordinate technical requirements of form, when justice will be subserved by departing from them."

In *Colin County National Bank* v. *Hughes* (C. C. A. 8), 155 Fed. 389, a writ of *scire facias* to revive a judgment had been served upon the judgment debtor by publication as ordered by the Federal Court in which the judgment had been rendered. The statutes of Colorado, in which the Federal Court sat, provided for personal service of necessary papers in proceedings to revive a judgment. The question was whether under the Conformity Act, the Federal Court was compelled to follow the procedure for service of the writ which was outlined by the State statute. The Circuit Court of Appeals held that the State enactment did not have the effect of limiting the power of the Federal Court to determine how its process should be served and held that the Conformity Act merely required that parties should be entitled to similar remedies to those provided by the State law. The court discussed the general question of conformity with State procedure under the Conformity Act and cited many cases which had held that strict conformity to the practice and proceedings in the State court is impracticable in the Federal Court, and that the Conformity Act does not require the United States Court to adopt any rule of pleading, practice or procedure enacted by the State or announced by State courts which would restrict the jurisdiction of the Federal Court or unwisely encumber the administration of justice therein.

In *Meyer* v. *Consolidated Ice Co.* (C. C. Ed. N. Y.), 163 Fed. 400, the court held that a provision of the New York

Supplementary Proceedings Statute which required that a witness could not be compelled to testify outside the county of his residence, was not binding upon the Federal Court adopting such State statutory procedure, and that a witness could be subpoenaed to appear on supplementary proceedings held in the Federal Court within a distance of one hundred miles from the place where the proceedings were to be had. The court remarked that the Federal Court could not be bound and restricted by technicalities of the State law whose procedure they adopted.

Opposing counsel may contend that the authorities we have cited are inapplicable here since they were decided under the old Conformity Act which required conformity with the State procedure "as near as may be" or, particularly, under 28 U. S. C. A. Section 727, Revised Statutes Section 916, relating specifically to enforcement of judgments which provided that a party recovering a judgment "shall be entitled to similar remedies" as provided by the laws of the State in which the court was held. Attempt was made below to distinguish between the word "similar" appearing in the statute mentioned, and the phrase "in accordance with the practice and procedure of the State" which is now embodied in Rule 69 (a). But an authoritative text writer says:

> "Rule 69 substantially adopts prior practice • • •",
> 3 Moore's Federal Practice, 3368, Section 69.02.

Immediately after the language quoted the text writer points out that the only difference under the new procedure is that Rule 69 provides for continuing conformity to the State practice, whereas the former statute required that State enactments coming into force after June 1, 1872 should not govern in the Federal Courts unless subsequently adopted by general rules of the District Court; and, further, Rule 69 (a) departs from the former practice in providing for

a broad examination of persons including the judgment debtor either by the taking of depositions as described in the Federal Rules or by following the practice of the State in that regard. Thus upon the authority of the text writer supported by a logical reading of Rule 69 (a) and considering the impossibility of an exact conformity with State practice in all cases we repeat our assertions that under the new rule as was the case under the old Conformity Act, the Federal Courts are not bound to "slavishly follow subordinate technical requirements of form, when justice will be subserved by departing from them", as the Court said in *Hein* v. *Westinghouse Air Brake Co.* (C. C. N. D. Ill.), 168 Fed. 766, from which we have quoted above.

From these authorities, then, it is apparent that in reviewing the correctness of the decision of the District Court in ordering supplementary proceedings and making its appointment of a referee, the following principles must be borne in mind:

(a) Any statute of the United States governs to the extent that it is applicable;

(b) As under the former practice, the technical procedural requirements of the State statutes must be observed by the Federal District Courts only in so far as they do not hamper or restrict the jurisdiction and power of the Federal Courts in giving effect to their judgments and affording remedies to the judgment creditor to which he is entitled.

The learned District Judge fully appreciated the force of this rule under the circumstances in the present case for in his opinion and order he said:

"The plaintiff cites authorities to show that strict conformity to state procedure may be impracticable, unduly restrict the jurisdiction of Federal Courts or obstruct the due administration of Justice" (R. 76).

and again he said:

> "If we were to follow blindly the technical details outlined in the ingenious argument of counsel for defendant doubtless plaintiff would prefer to quit at the beginning. In adopting the state practice it was never intended that the defendant could require the judgment creditor to follow every possible requirement that might be found in the state statute and decisions bearing on the subject where wholly different and distinct remedies are provided. It seems to the Court under the facts presented here that the judgment creditor has selected remedies provided by the state statute in Sections 9454 and 9458 that are ample and sufficient for the purposes intended" (R. 77).

6. The District Court had inherent power under the new rules, and of its own motion to seek the aid of a referee in any event.

In the opinion of the author of Moore's Federal Practice the court could order a reference without any application, in a proper case.

The writer says:

> "In actions tried without a jury, since the Rule allows a reference 'only upon a *showing* that some exceptional condition requires it,' it would seem, inferentially, that the court should not make a reference on its own motion. However, the court should have the inherent power to seek the assistance of a master on its own motion, and it has been so held under Equity Rule 59, which in its relevant section reads like Federal Rule 53 (b)."
>
> 3 Moore's Federal Practice 3133, Sec. 53.03.

The following cases are cited in support of the text:

Smith v. *Brown* (C. C. A. 5th), 3 F. (2d) 926;
Flanders v. *Coleman* (S. D. Ga.), 249 Fed. 757;
Berlin v. *Evans* (E. D. Pa.), 300 Fed. 677.

The Honorable District Judge certainly had the geography of Montana well in mind, as well as the demands of his regular judicial business and the probable length of the proposed examinations when he ordered a reference at the request of the respondent. There is nothing in the affidavit of petitioner's counsel (R. 58), filed in support of Bair's motion to vacate the order appointing the referee to indicate that these exceptional conditions did not exist. The uncontroverted facts within the knowledge of the Judge constitute a sufficient reason for the action taken.

7. If a showing of exceptional circumstances was required for appointment of a referee under Rule 53, those circumstances were before the trial judge who issued the challenged orders. He had had the parties before him in this litigation for years past and well knew the resistance of the debtor (See Unreported Opinions of Pray, D. J. Appendix, pp. 47, 48-49); there was a record of fourteen attempts at garnishment under execution, in five cities and four countries of Montana (R. 4-7, 7-33).

The trial judge is not required to act as a creditor's ferret.

Let us demonstrate, by way of argument, the difficulties confronting the trial Judge in deciding upon either a time or place for the conduct of the examination of the judgment debtor or other witnesses to be examined, all bearing on the necessity of proceeding through a referee.

The Honorable Charles N. Pray, the District Judge who signed the order, resides in Great Falls, Montana where application was made to him for the order in question. This is some ninety-five miles by highway from the City of Helena where reside E. G. Toomey, of counsel for the plaintiff below, and W. D. Tipton, the referee appointed. Mr. Bair, the judgment debtor, and his wife and two daughters maintain their residence at the debtor's country home near Martinsdale, Montana, which is some one hundred and ten

miles by highway east of Helena and the county seat of the county of his residence, to-wit, White Sulphur Springs in Meagher County, lies some eighty miles or more east of Helena, and thirty miles from Martinsdale. The proposed witnesses Collins and Chamberlain and the books and records of the Bair-Collins Company sought to be subpoenaed were situated at Roundup, Montana, some eighty-five miles east of Martinsdale and nearly two hundred miles east of Helena. The witnesses Wood and Cooke, and the records of The Bair Co. sought to be examined, were situated in Billings, Montana, some forty-five miles south of Roundup. Mr. Beers, also counsel for Appellee, resides in Billings likewise. These locations and distances may be easily ascertained by the court by reference to any standard atlas or road map. The facts and circumstances were all within the knowledge of the trial Judge at the time when he made the order and certainly he could take judicial notice of them.

Whether the Judge himself or the referee was to set the time and place of the respective hearings, certain factors were necessarily considered. First of all arrangements had to be made to obtain a place for such examinations, and obviously it would be more difficult for the Judge, in Great Falls, to make such arrangements at the various county seats than would be the case with the referee residing in Helena. Secondly, it was necessary to consider when service could be made upon the judgment debtor and the various witnesses sought to be examined. Past experience in this very case has demonstrated the reluctance of the judgment debtor to appear and testify (he did not attend or seek to excuse himself from attending the trial which resulted in judgment against him) and it was to be expected, even anticipated, that upon receiving any intimation of attempts on the part of the judgment creditor to serve him with a subpoena he would immediately take flight. This was like-

wise known to the District Judge. Since an investigation as to the whereabouts of the judgment debtor and members of his family at the particular time contemplated for the issuance and service of subpoenaes had to be made by the creditor's counsel and all possible speed after obtaining such information was necessary, it was entirely fitting to leave it to the referee, residing in the same city with one of the plaintiff's attorneys, to fix the time and place of the hearing, so that as soon as counsel obtained the necessary information, application could be made to the referee for a proper order, subpoenaes secured from the Clerk of the Court, and placed in the hands of the Marshal for immediate service. Thus there would be obviated the necessity of counsel making a round trip from Helena to Great Falls to secure an order of the District Judge setting the time and place for hearing after counsel obtained the necessary information. There was serious danger that the judgment creditor might be entirely defeated in its efforts to obtain examination of the debtor and other witnesses if its counsel had been compelled to travel such distances every time it was desired to obtain a proper order in furtherance of the remedies sought to be invoked.

Furthermore the judgment debtor suffered no prejudice whatsoever by reason of the omission from the order of the District Judge of any specification as to the time and place for holding the examination.

The order of the referee setting the examination of the debtor for June 21st was made seven days earlier, on June 14th (R. 43-44). The subpoena addressed to Mr. Bair, together with a copy of the affidavit of E. G. Toomey, a copy of the order of Honorable Charles N. Pray and a copy of the order of W. D. Tipton, fixing the time and place of hearing, were all served upon the debtor on June 15th, a full six days before the time specified for the hearing (R.

46-47). The order of the referee (R. 42-44) the subpoenaes of the clerk (R. 44-45) fixed the place of examination of the debtor in the county of his residence (R. 54). In view of this we ask opposing counsel what right or benefit would the judgment debtor, petitioner here, have had if the time and place for his examination had been specified by the District Judge when the original order was made, which the debtor did not have when these matters were fixed by the order of the referee? Full and ample notice of the time and place was given him, at least six days before the time when he was to be examined. He had ample time to serve and file his motion for vacation of the order of the Judge and for a stay of proceedings, on June 19th, two days before the hearing, and such a stay was in fact obtained (R. 54-57 and 68). The course pursued by the District Judge and by the referee appointed by him did not in the least prejudice the judgment debtor or any witness subpoenaed to testify and since the District Judge followed the course he did in the sound exercise of his discretion and the petitioner here has not been injured thereby we respectfully submit that he cannot object to the procedure in the lower court.

8. Moreover, if we concede for the sake of argument that the State statutes contain all the technical requirements which petitioner claims, then the very existence of such requirements furnished the "exceptional condition" warranting appointment of a referee by the court in this non-jury matter under Rule 53 of the Federal Rules.

This is true because the attempt to apply such requirements, established at least as far back as 1895 for a State court system now embracing fifty-six counties in seventeen judicial districts, would defeat the administration of justice in the Federal District Court. Petitioner argues that the State statutes require that the referee must be a resident

of petitioner's county; and, apparently of every county where witnesses are to be examined; that the *court's order* does not fix the time or place of petitioner's examination; though the Referee's order does (R. 42-44); and the court confirmed and ratified (R. 79); that no account is involved and hence a reference may not be had; that a referee may be appointed only if agreement cannot be reached by the debtor and creditor as to the referee (R. 54-57; Petition pp. 5-8; Brief of Petitioner, pp. 11-13 and 16-24).

The District Court was not obliged to recite all the foregoing exceptioned conditions (this brief, pp. 19-22 above) in its order; its action is presumed to be regular. Petitioner does not complain of hardship or prejudice. Petitioner was accorded fair notice and fair opportunity to be heard. Petitioner offered no facts to overcome the obtrusive reality before the trial court. Petitioner has never offered to put himself or his records at the disposal of the court or of any referee and he does not so offer now. Under these conditions Rule 53 is ample basis for the trial court's Order for Supplementary Proceedings and Appointing Referee to Conduct Same (R. 37-40) and its re-affirmance of that Order, after examination of the Referee's proceedings, against the attack by Petitioner (R. 75-79).

II.

If it be conceded that the State practice and procedure dominates in the field of supplementary proceedings in the case at bar, the statutes of the State furnish ample basis for the orders (R. 37-40; 79) made by the United States District Court for Montana.

(In Answer to Petitioner's Argument Found at Pages 11-13 and 16-24 of Petitioner's Brief in Support of Petition for Writ of Certiorari.)

Petitioner makes complaint of the District Court's Order Appointing Referee, etc. (R. 37-40), as a departure from the State procedure:

1. In subdivision (3) (a) of Petitioner's Brief (16-19) it it argued that under Section 9454, Revised Codes, Montana, 1935, the court—as distinguished from the referee—must specify the time and place of examination of the debtor in the county of the debtor's residence.

2. In subdivision (3) (b) of Petitioner's Brief (19-21) it is urged that under Section 9454 Revised Codes of Montana, 1935, the examination of the judgment debtor was required to be had in Meagher County where he resided, (and where it was ordered by the referee, R. 43) and that since Section 9376, Revised Codes of Montana, 1935, specifies that a referee appointed by a State court shall reside in the county in which the action or proceeding is triable, the lower court erred in appointing Mr. Tipton as referee, who is admittedly a resident of Lewis and Clark County. In such subdivision of his Brief, Petitioner also complains that under Section 9374, Revised Codes, Montana, 1935, he should have been given opportunity to consent to some suitable referee before appointment.

In his attempt to delay his examination, and that of witnesses called by the creditor, petitioner confuses two (2) groups of State statutes, *i. e.*,

(a) Sections 9374-9379, Revised Codes of Montana, 1935, dealing generally with the subject of referees; and

(b) Sections 9454-9458, Revised Codes of Montana, 1935, *dealing specifically with supplementary proceedings and of referees incident to supplementary proceedings.*

Section 9454 of Group (b) was referred to by the Circuit Court of Appeals as "the pertinent statute" (R. 115)

and obviously it is. It is the statute which refers to "proceeding on execution," "in proceedings supplementary to and in aid of judgment," and "in proceedings on and in aid of execution that Rule 69 refers to, not to the practice respecting appointment of referees generally.

In *supplementary proceedings,* the power of the State court with reference to referees *is enlarged,* and not restricted by group (a) above.

Ex parte Drew (Cal.) 207 Pac. 249.

In the *Drew* case, the Supreme Court of California construed Section 714 of the California Code of Civil Procedure, which is identical with Section 9454, Revised Codes of Montana, 1935, *as an enlargement of the State court's power in appointing referees in supplementary proceedings, contrasted with its power generally under* Section 640 of the same California Code, which latter section is identical with Section 9376, Revised Codes of Montana, 1935, saying:

> "We think the provision of Section 714 must be considered *as an enlargement of the power, if* Section 640 may be considered as requiring the appointment of a referee residing in the county in which the cause is tried. Section 714 authorizes the court to appoint a referee in supplementary proceedings, and at the same time does not authorize the party to be examined except in the county where he resides or has a place of business. This necessarily implies that where the party resides in another county the examination may be held in that county, since otherwise there could be no examination of such party. Section 715 authorizes an examination before a referee 'at a specified time and place'. *It does not limit the place at which the examination may be had in proceeding under that section.*"
>
> *Ex parte Drew* (Cal.), 207 Pac. 249.

This language indicates that the powers of the Superior Courts of California, which are the same as the State Dis-

trict Courts of Montana, are not to be limited by the general statutes relating to appointment of referees, when they are *proceeding in supplementary proceedings, but rather than the Superior Courts, in appointing referees in such proceedings, have enlarged powers beyond those given by the statutes relating to referees, and therefore may proceed in appointing such officers in a manner effectual to carry out the supplementary process in aid of execution.*

1. With this preliminary understanding of the difference between the two groups of State statutes confused by petitioner, we now answer his first complaint that the United States District Court acted improperly, assuming the State practice applicable, in authorizing the referee to fix the times and places for hearing to be had (petitioner's brief, pp. 16-19; see our par. 1, this brief, p. 25, above).

In this case the order of the District Judge was in part, as follows:

> "And it is further hereby ordered, and this does order, that the said C. M. Bair, defendant and judgment debtor above named, do appear before said referee at the time or times and place or places to be designated by said referee, and then and there to make true answers under oath concerning his property; * * *" R. 39-40).

It is our contention that under the State practice itself, the court is authorized to leave this matter or the time and place for examination to be determined by the referee, and, further, that the specification of such a time and place for examination is a matter of mere procedural detail which the Federal District Judge may, in his discretion to promote the ends of justice and his own convenience, leave to the referee appointed by him under the provisions of Rule 53 of the Federal Rules of Civil Procedure which is applicable here.

A. The State Procedure.

In Riddle and Bullard on Supplementary Proceedings, Third Edition, we find the following at page 134:

> "The order of reference may empower the referee to fix the time and place of the examination and to issue his summons to the judgment debtor or third party to attend the reference before him at such time as he shall designate. Redmond *v.* Goldsmith, 2 N. Y. Mo. L. Bull. 19, N. Y. Common Pleas, Special Term, Van Hoesen, J."

This case is likewise cited for the same proposition in Note 10 (a) 23 C. J. 852, and also at page 100 of George W. Bradner's "Practice in Supplementary Proceedings".

The original report of this case appears in 2 N. Y. Monthly Law Bulletin 19 and is here set out at length:

> "Referee * * * Powers of in Supplementary Proceedings.
>
> 11. Where a judge who signs an order in supplementary proceedings appoints a Referee to take the examination of the judgment debtor, but does not name the time or place for such appearance but merely directs the debtor to appear at such times and places as might be duly appointed by the Referee, it is proper, and the Referee may issue his summons for the debtor to appear before him, and the debtor will be guilty of contempt if he fails to obey such summons. (Opinion by Van Hoesen, J. Redmond *v.* Goldsmith. Dec. 1879.)"

Montana Code Section 9454 was taken directly from the California Code of Civil Procedure (Cal. C. Civ. Proc. Sec. 714) and was originally a part of the old Field Code of New York State. The New York statute which was in force at the time of the decision of the *Redmond* case was the same as our Montana statute which is in force at the present time. (See appendix to petitioner's brief, p. i.)

Although the *Redmond* case was decided by an inferior court, it is the only authority which we could find upon this question. We have found no authorities whatsoever contrary to our position here and petitioner cites none. The *Downey* case which he refers to is not in point at all (see pp. 41 to 45, *infra,* this brief). Since the decision was rendered in New York State, apparently under the New York Supplementary Proceedings Law, which was the same as our applicable statute in Montana, we respectfully submit that the authority is highly persuasive and that both the District and the Circuit Court of Appeals were correct in giving it notice.

Furthermore, the provisions of Section 9379, Revised Codes of Montana, 1935, show that under the provisions of the State Codes it is perfectly proper for the court to leave the fixing of the time and place of hearings to the referee, for by the provisions of that section it is clear that a referee appointed enjoys the same powers and discretion to control the conduct of the hearings to be had as would be enjoyed by the judge himself. This statute is set out in full in the appendix to this brief. (See appendix, p. 49.)

We deny, as above argued (pp. 12 to 24 this brief) that the statutes of Montana relating to the appointment, qualifications and powers of referees are applicable in these proceedings, in view of the provisions of Rule 53 of the Federal Rules of Civil Procedure, but even if the view of petitioner should be taken, that the State statutes relating to referees are controlling here, reference to the provisions of Section 9379, referred to above, indicates that the rule as announced in the case of *Redmond* v. *Goldsmith* would be applicable and therefore that the District Judge below did not err in leaving it to the discretion and authority of the referee to fix the times and places for hearings to be had upon the supplementary proceedings.

Therefore in answer to petitioner's insistence that the Federal Judge must have complied strictly with all procedural requirements of the State statutes, we state that the State statutes, as properly construed, have in fact met with full compliance by the lower court.

B. The Federal District Court Was Not Compelled to Conform to the Letter of the State Statute by Specifying the Time and Place for Hearing.

As we have hitherto demonstrated in the course of our argument, the Federal courts in following the State practice under the new Federal Rules of Civil Procedure, and particularly Rule 69 (a) thereof, are not required to observe collateral or subordinate provisions of the State practice which tend to obstruct the administration of justice and they may dispense with matters of technical form, not affecting substantial rights or operating to the prejudice of a party. (*Hein* v. *Westinghouse Air Brake Co.* (C. C. N. D. Ill.) 168 Fed. 766.)

Here, again, we invite the court's attention to what is said at pages 20 to 23 of this brief, with reference to the practical difficulties confronting the United States District Judge in the matter of himself fixing times and places for examination of the judgment debtor.

2. We now answer petitioner's second complaint that the United States District Judge acted improperly, assuming the State practice applicable, in appointing as referee one not a resident of the county of debtor's residence, and, further, one whose appointment the judgment debtor had no opportunity to consent to, or to reject (petitioner's brief, pp. 19-21; see our #2 this brief, p. 24 above).

In answer to this we contend first, that under the State practice, as followed by the State courts, the provisions of Section 9376, Revised Codes of Montana, 1935, *are not bind-*

ing upon a court appointing a referee to conduct supplementary proceedings under Section 9454 Revised Codes of Montana, 1935, and second, that the Federal court is not bound by the geographical limitations of the State statutes, particularly in view of the existence of Rule 53 of the Federal Rules of Civil Procedure which alone is binding upon the Federal courts and by which their powers are measured.

THE STATE PRACTICE: RESIDENCE OF REFEREE AND DEBTOR.

The rules relating to *the appointment and powers of Referees to conduct supplementary proceedings* under the New York Supplementary Proceedings Statutes, the same as those in force in Montana, are stated in the following quotation from Riddle and Bullard on Supplementary Proceedings, Third Edition, at page 129:

> "The referee may be appointed in the first instance before the judgment debtor has appeared. Green *v.* Bullard, 8 How., 213. Sections 2442 and 2443 provide for this. He may be appointed in either of the remedies provided for in Section 2432 of the Code of Civil Procedure. A Supreme Court justice may appoint a referee to hold sessions and take examination in any part of the state. He need not reside in the county of the party to be examined, or where the examination is taken. Bingham *v.* Disbrow, 14 Abb., 251; S. C., 37 Barb., 24; Wilson *v.* Andrews, 9 How., 39."

In *Schults* v. *Andrews,* 54 How. Pr. 376, the court said that a judgment debtor may be required to appear before a referee who resides in the county, or holds his hearing in the county where the debtor is or resides.

It has been directly held by the Supreme Court of California that Section 640 of the Code of Civil Procedure of that State, which is the same as Section 9376 of the Montana Codes in requiring a referee to reside in the county in which the action or proceeding is triable, *does not restrict the*

power of the State court in appointing a referee to conduct supplementary proceedings under Section 714 of the California Code of Civil Procedure which is identical with Section 9454 of the Montana Codes.

Ex parte Drew (Cal.), 207 Pac. 249.

We cite and quote from the *Drew* case again because it is again directly applicable in this area of the argument. In speaking of these two statutes the court said, at page 251 of the Pacific Reporter on this very point:

> "We think the provision of Section 714 must be considered *as an enlargement of the power,* if Section 640 may be considered as requiring the appointment of a referee residing in the county in which the cause is tried. Section 714 authorizes the court to appoint a referee in supplementary proceedings, and at the same time does not authorize the party to be examined except in the county where he resides or has a place of business. This necessarily implies that where the party resides in another county the examination may be held in that county, since otherwise there could be no examination of such party. Section 715 authorizes an examination before a referee 'at a specified time and place'. *It does not limit the place at which the examination may be had in proceeding under that section.*"

THE FEDERAL COURTS ARE NOT BOUND BY TERRITORIAL RESTRICTIONS FOUND IN THE STATE STATUTES.

At the foot of page 22 of petitioner's brief, opposing counsel state that the remedy to be obtained by resort to supplementary proceedings under Section 9454, Revised Codes of Montana, 1935, is in the nature of a statutory substitute for a creditor's bill under the old equity practice. In the Circuit Court of Appeals, petitioner followed this assertion by arguing that supplementary proceedings were in effect a new suit, having a different venue from that of the action

from which it springs (p. 37, Petitioner's C. C. A. Brief). Thus they contended that the examination of the judgment debtor must be had in Meagher County, Montana, where he resides and that the referee to conduct the same must be a resident of that county.

It is recognized by a State court where the practice is the same as in Montana, that the process in supplementary proceedings must originate in the very court in which the judgment was rendered. See *Corcoran* v. *Harris* (Cal.), 270 Pac. 391, where it was held that the Superior Court of Alameda County had no power to make an order for supplementary proceedings based upon a judgment of the Superior Court of Los Angeles County, although the judgment debtor resided in Alameda County.

Section 172 of Title 28 U. S. C. A. provides in effect that the State of Montana shall constitute one judicial district and that terms of the District Court shall be held in various cities throughout the State at times stated therein. Provision is also made for the transfer of causes from one city in the State to another when the convenience of the parties or the ends of justice would be promoted by such transfer. This act of Congress, defining the territorial jurisdiction of the District Court of Montana does not recognize territorial subdivisions of the State and the existence of county lines can have no effect in limiting the jurisdiction and power of the District Court. This was recognized by the court below in the following language of its opinion:

> "This action was triable at Helena in the Helena division of this Court, which is situated in Lewis and Clark County, under Federal rules; cases arising within the jurisdiction of this Court in Meagher County are triable at Helena, consequently there could be no merit in the contention that a referee must be appointed from Meagher County" (R. 76).

In *Meyer* v. *Consolidated Ice Co.* (C. C. E. D. N. Y.), 163 Fed. 400, certain officers of the judgment debtor, a corporation, contended that they could not be compelled to testify outside the county of their residence, relying upon the statute of New York State providing that a judgment debtor or officer of a corporation required to attend in its behalf could not be compelled to attend in supplementary proceedings at a place without the county wherein he resided. The court held that it was not bound by this provision of the State statutes. The language used by the court is entirely applicable to the case at bar and is quoted in the appendix to this brief at pages vi and vii.

Here again is an illustration of the rule that the Federal courts are not compelled to follow the technical requirements laid down by the procedural statutes of the State where such requirements would unduly restrict the jurisdiction of the court and the proper exercise of its powers.

There is a further reason why the lower court was not compelled to appoint a referee who was a resident of Meagher County. That reason lies in the language of Rule 69 (a) that any statute of the United States governs to the extent that it is applicable, and the language of Rule 53 which has the force of such an applicable statute.

Rule 53 (a) provides in part:

> "As used in these rules the word 'master' includes a referee, * * *"

There can be no question that under Rule 53 the referee is an officer of the court itself, exercising many of the powers of a Judge of the court. (See particularly subdivision "c" of Rule 53 defining the powers of referees.) There is nothing in Rule 53 or in any of the other Federal Rules or acts of Congress which requires that a referee to be appointed in supplementary proceedings must be a resident of the county in which the judgment debtor resides.

The Federal Rules of Civil Procedure, adopted and promulgated pursuant to Act of Congress make full and ample provision for the appointment of referees by Federal Courts and since Rule 69 (a) expressly provides that any applicable United States Statute shall govern the Federal Courts in the conduct of supplementary proceedings, we believe it is not open to question that the Federal court in appointing the referee in the case at bar was in no manner controlled or bound by the provisions of Section 9376, Revised Codes of Montana, 1935, or any other provision of State law. Therefore the District Judge had the power to appoint Mr. Tipton, a resident of Lewis and Clark County, as referee to conduct these proceedings, and in no way abused his discretion in so doing.

THE STATE PRACTICE: CONSENT OF JUDGMENT DEBTOR TO REFEREE.

Notwithstanding this fact, Petitioner now *suggests* (Petitioner's Brief, pp. 19-21) though he heretofore *argued* that Sections 9374, 9375 and 9376, Revised Codes of Montana, 1935, governed the lower court in making appointment of a referee to conduct supplementary proceedings herein, and since no opportunity was here given the judgment debtor to agree upon a referee or to refuse to consent to the appointment of such an officer, the court was without power to name an officer to conduct the proceedings.

But there is no requirement in Sections 9374 and 9375, Revised Codes of Montana, 1935 (Page ii of Appendix to Petition) that parties must agree, that they must attempt to agree, that they are required to negotiate for any period of time in such an attempt to agree, upon a referee. Under Section 9375 when the parties "do not consent", the court, *upon the application of either,* or *"of his own motion,"* may appoint the referee. The petitioner did not consent.

The petitioner has never suggested a referee. The respondent was not obligated to waste any time in trying to gain petitioner's consent. The District Court was not required to wait on any process of negotiation.

The following decisions of State courts show that where a writ of execution has been returned in whole or in part unsatisfied, supplementary proceedings may be had upon the *ex parte* application of the judgment creditor:

Collins v. *Angell* (Cal.), 14 Pac. 135;
English v. *Smith* (Neb.), 96 N. W. 60;
Robinson v. *McMaster* (So. Car.), 95 S. E. 110;
Sweeney v. *Cregan* (Colo.), 299 Pac. 1058;
Ackerman v. *Green* (Mo.), 100 S. W. 30.

These cases were all decided under State statutes the same, or essentially similar to, those of Montana.

Since an order for supplementary proceedings may be obtained *ex parte,* there is no reason to suppose that the court would not have power to appoint a referee to conduct such proceedings at the same time. The case of *Ackerman* v. *Green* (Mo.), 100 S. W. 30, cited above, recognized the validity of an order so appointing a referee without notice to the debtor.

If notice had been given petitioner in this case, it is probable that, instead of agreeing upon a referee, he would have immediately put himself beyond the reach of process, and the purpose of Rule 69 (a) would have been entirely defeated.

Moreover, he has not been prejudiced in any way for he had ample time to appear and object to the qualifications of the referee, and obtain a stay before giving a word of testimony.

THE STATE PRACTICE: ATTENDANCE OF WITNESSES—NOT DEBTOR.

(In answer to Petitioner's Brief, pp. 21-24.)

Finally, petitioner objects to the provisions of the order of June 8, 1939, authorizing the referee to compel the attendance of necessary witnesses at hearings in any county in Montana (R. 39-40; 42-44, Petitioner's Brief, pp. 21-24).

All persons other than petitioner were to be examined *as witnesses* for the judgment creditor.

No claim was made that they are to be examined as debtors of the judgment debtor, the petitioner here, nor as persons holding property of that debtor.

Sections 9454 and 9458, (Chapter 60, Code of Civil Procedure, "Proceedings Supplementary to the Execution") Revised Codes of Montana, 1935, provide:

> 9454. "When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this State, to the sheriff of the county where the judgment-roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides."
>
> 9458. "Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue."

Under these sections the judgment creditor is "entitled" to subpoena for "witnesses to appear and testify" upon

Supplementary Proceedings on one condition only, i.e., that the judgment "is returned unsatisfied". There is no requirement that witnesses must be examined where the judgment debtor is examined, or that the order of examination is not subject to the judgment creditor's control.

In these proceedings, Bair, Mrs. Bair and his two daughters were all to be examined in Meagher County (R. 43) where they resided, Chamberlain and Collins were subpoenaed to attend in Musselshell County (R. 43) where they resided and the records of Bair-Collins Company were kept and Yellowstone County was designated as the place of examination of Wood and Cooke (R. 44) where they resided and the records of The Bair Co. were to be found.

It is not to be presumed that a public official will disregard his duty or abuse his discretion. It is not to be presumed in this case that the referee will attempt to deprive the Petitioner of any right he may have in respect of the time and place of his examination. If the referee should make such attempt, the United States District Court for Montana is open to afford full protection against unwarranted assumption of power.

It is apparent that a thorough examination of the petitioner, and all witnesses and documentary evidence which may be material might take many days. We find no limitation in Rule 69 (a) or in the State statutes, prohibiting more than one hearing, of either the defendant or others. The lower court wisely gave authority to the referee to guide the conduct of these hearings, to adjourn them from time to time and hold them in the proper places. Such a grant of power was necessary, else counsel would spend much of their time travelling about the State of Montana obtaining further orders from Judge Pray.

But counsel for petitioner go even further, contending that the witnesses other than the defendant himself could

not be compelled to appear or testify until the debtor had been examined and a vague something called an "issue" had been found (Petitioner's Brief, p. 23). The issue is already plain, and lies in the question whether the debtor has property which can be applied to satisfaction of the creditor's judgment, by execution, or action to set aside fraudulent conveyances (R. 77, per Pray, D. J.). Anyone who may have knowledge of facts bearing upon that question may be called and interrogated. If he has no such knowledge, the referee will excuse him; if he has, he must reveal it.

Similar objection was made by certain witnesses subpoenaed to testify in a supplementary proceeding in *Capital Company* v. *Fox* (C. C. A. 2nd), 85 F. (2d) 97, 106 A. L. R. 376, namely, that the scope of their proposed examination was unlimited and not confined to any definite issue. In answer to this the Honorable Learned Hand, delivering the opinion of the court, said:

> "It is quite true that to allow an uncontrolled examination into the affairs of anyone whom the judgment creditor might select would be oppressive; might indeed be so much so as to fall within the Fourteenth Amendment, U. S. Const. The statute does nothing of the kind; the examination is conducted before a judge or a referee, who is to keep it within bounds and exclude prying into irrelevant matters. Such a limitation will not serve the 'third parties' at bar; in order to succeed they must maintain that they cannot be summoned to court at all. That position would be equally open to every witness, in every court, in every suit; consistently applied, it would completely frustrate the administration of justice. No authority is cited for so extravagant a pretension; we should not follow it, if it existed, unless it were authoritative upon us. These subpoenas perform the common office of a subpoena, so far as they merely require attendance and submission to examination."

To further answer opposing counsel's contention that the witnesses other than Bair were summoned prematurely and indiscriminately we turn now to the statutes of Montana relating to supplementary proceedings. Insofar as they are applicable to this discussion, they are Sections 9454, 9455, 9457 and 9458, Revised Codes of Montana, 1935. (See appendix to petition, pages i-iii.)

These statutes provide three distinct remedies, as follows:

1. Against a judgment debtor after return of execution unsatisfied (Section 9454).
2. Against a judgment debtor after issuance and before return of execution (Section 9455); and
3. Against a person who has property of, or is indebted to a judgment debtor (Section 9457).

11 California Jurisprudence, 147;
Brindjonc v. *Brindjonc*, 96 Mont. 481, 31 Pac. (2d) 725;
Wilson v. *Harris*, 21 Mont. 374, 54 Pac. 46.

Section 9458 (appendix to petition, page iii) provides that witnesses may be required to appear and testify before the judge or referee, upon *any proceeding* under that chapter, *in the same manner as upon the trial of an issue.* Thus, witnesses may be called in any of the three proceedings noted above. They must testify in the same manner as upon the trial of an issue, not when, and only when, a formal issue has been framed, as counsel suggest. The language italicized by us shows that the legislature realized that no formal issue could be reached, in such summary proceedings, for by their nature, they are to discover facts, not to prove facts already known. If the facts were known, the plaintiff would not be compelled to resort to such examination after judgment. A levy of execution, or an action to set aside a transfer follows after the discovery, and therefore supplementary proceedings are not a complete substitute

for the equitable creditor's bill. (*Wilson* v. *Harris*, 21 Mont. 374 at 407, 54 Pac. 46 at 56.)

THE STATE PRACTICE (CONTINUED): "THE DOWNEY CASE".

Counsel cite, and quote excerpts from the Montana case of *In re Downey*, 31 Mont. 441, 78 Pac. 772 (pages 5, 7 of petition and 17, 18, 22 and 25 of petitioner's brief), and contend that it supports their construction of Section 9458 to the effect that third party witnesses may not be called at this time, etc. The *Downey* case was treated by counsel for petitioner in the Circuit Court of Appeals as controlling. That court does not mention the case in its opinion (R. 112-117). Upon examination that court found the *Downey* case to be without any application. An analysis of the Downey decision will so show, and demonstrate why the Circuit Court of Appeals could make no use of it.

In the *Downey* case the petitioner, Downey, was judgment debtor in another cause. The creditor filed an affidavit for supplementary proceedings under what is now Section 9454 of the Revised Codes of Montana, 1935, after execution was returned unsatisfied. Upon examination of the judgment debtor it appeared that she had an order for payment of money drawn on the Catholic Knights of America, which she had forwarded to that organization for payment. The court ordered her to pay the judgment from the proceeds of that collection. Upon failure to obey this order, she was held in contempt, whereupon she applied to the Supreme Court in the case cited, to review the contempt order. The court held (1) that the order to pay the judgment was erroneous, but (2) it was appealable, hence petitioner had no remedy by *habeas corpus* or certiorari. *There was no question in the case of calling witnesses.* In determining the powers and jurisdiction of the District Court in the supplementary proceedings the court summarized one by one

the statutes relating to such proceedings, including the present Section 9458 (then 1264) which was not in question, and said: " * * * Section 1264 authorizes the calling of witnesses in order to determine issues of fact arising during any of the proceedings * * * ", thus loosely paraphrasing the language of the statute.

Counsel would have this Court construe those words as preventing the calling of witnesses until an issue had arisen during the examination of the debtor. We do not believe such a construction is justified by the language, and it certainly is not supported at all by the plain terms of Section 9458.

Furthermore, the remark of the Montana Supreme Court was not related to any issue in the case, for a construction of Section 9458 was not required by the decision. Such a dictum is of no force as an authority binding upon this Court. (Hughes Federal Practice, Vol. 6, Section 3742, page 289, *et seq.*)

The court was not there speaking of Section 9454 alone, but was referring to the entire chapter on supplementary proceedings, and the language quoted was the court's preface to its ruling that the lower court did not have power to direct the debtor to collect her claim and apply the proceeds to the judgment, but should have appointed a receiver to effect such collection.

Counsel for petitioner cite no authority for the proposition that the witnesses here in question were prematurely, indiscriminately or wrongfully called.

In 23 *C. J.* 859, Executions, Section 994, the rule is stated:

> "Witnesses—a. In General. Either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action. Third persons alleged to be indebted to the judgment debtor may be called, but such parties can

only be required to answer concerning the alleged indebtedness and as to the fact whether they have property belonging to the judgment debtor. The judgment debtor need not be examined but his possession of property may be shown entirely by the examination of other witnesses."

The following cases support the text:

Bipus v. *Deer* (Ind.) 5 N. E. 894;
Seyfort v. *Edison* (Sup. Ct. N. J.), 1 Atl. 502;
Colton v. *Bigelow*, 41 N. J. L. 266;
Lathrop v. *Clapp*, 40 N. Y. 328;
N. Y. C. First National Bank v. *Gow*, 124 N. Y. S. 454;
Millar v. *Weaver*, 53 N. Y. S. 259;
People v. *Maiston*, 18 Abb. Pr. 257;
Sandford v. *Carr*, 2 Abb. Pr. 462;
Graves v. *White*, 12 How. Pr. 33;
LaFontaine v. *So. Underwriters Assn.*, 83 N. C. 132;
State v. *Downing* (Ore.), 66 Pac. 917;
Honce v. *Schram* (Kan.), 85 Pac. 535.

The statutes under which these cases were decided were the same as, or similar to, those of Montana.

At page 23 *et seq.* of petitioner's brief, it is agrued that since supplementary proceedings are a substitute for a creditor's bill, the old equity practice of requiring a statement of issuable facts must be followed, else a mere "fishing excursion" results, which the courts will not countenance.

It is improper to call supplementary proceedings a substitute for a creditor's bill.

Wilson v. *Harris*, 21 Mont. 374, 54 Pac. 46.

It was because of the inadequacy and lack of flexibility of the old equity procedure that the remedy of supplementary proceedings was first adopted in New York.

Cohen: Collection of Money Judgments in New York; Supplementary Proceedings (1935), 35 Col. L. Rev. 1007.

> "The legal device, called supplementary proceedings, is a searching weapon designed to reach the concealed property of one reluctant to pay his debt. Its movement is intended to be direct and swift. So far as applicable, it supersedes the ancient remedies, usually slow and cumbersome, which were employed to reach a like result. The statutory remedy is applicable here and it has cut through to the very heart of the matter, as it was designed to do."
>
> *Davis* v. *Spencer*, 87 Mont. 12, at 16, 285 Pac. 193.

Rule 69 (a) specifically authorizes a broad examination, providing that the judgment debtor "* * * *may examine any person,* including the judgment debtor, * * * in the manner provided by the practice of the State * * *." This is in accord with the liberality of the new rules in regard to proceedings for discovery and taking of depositions before trial.

Thus, the State statutes, the decisions of other States having similar statutes, and Rule 69 (a) all contemplate a speedy, thorough examination of the judgment debtor and all other persons who can throw light upon the status of his property. The old formal requirements of the equitable creditor's bill, the allegation of the very facts which the creditor seeks to discover and the framing of defined issues have all been discarded and the new statutory procedure for discovery of the very facts required as foundation for the old action has been substituted in its place.

The only issue conceivable, *i. e.*, the existence of property of the debtor, is as fully before the referee now as it would ever be after examination of the Petitioner himself. Indeed, he might testify, and probably would, that he has no property, and that none of the witnesses proposed to be examined has any material knowledge. Thus, the very

"issue" which his counsel say must be raised before these witnesses may be called, could never be raised. As the New Jersey Court pointed out in *Colton* v. *Bigelow,* 41 N. J. L. 266, the creditor should not be bound by the denial of the debtor, and other witnesses may be examined to discover the true facts.

The purpose of the supplementary proceedings statutes, the very nature of these proceedings, which deal with shifty and elusive debtors and the clear language of the legislature all sustain the view of the District Court and the referee that the witnesses here subpoenaed might all be required to appear and testify at the times and places fixed, without preliminary examination of the debtor. Unless courts have adequate means of enforcing judgments, the latter become mere "scraps of paper".

III.

Conclusion.

In conclusion, it is respectfully submitted that the orders of the District Judge "For Supplementary Proceedings and Appointing Referee" (R. 37-40) re-affirmed after inspection of the Referee's actions thereunder (R. 75-79) and by the Circuit Court of Appeals twice (R. 112-117 and R. 118) are valid, whether based alone on the new Federal Rules of Procedure, or on the Montana Practice, or on a combination of both procedures, if necessary and to the extent permitted.

We respectfully submit that this great Court should take this early opportunity, by denial of review by certiorari, to say that where, as here, the action of the trial court affords fair notice, fair opportunity to be heard and gives evidence of judicial care to avoid prejudice, and there is present continuing check on subordinate judicial aids to that end, such action will stand proof against judicial

review. These querulous litigations of procedure must cease if the new Federal Rules of Procedure are to serve their purpose—otherwise we waste our substance wandering in the wilderness of the old Conformity Act, or worse. The creditor here has been delayed more than a year by picayune objections to procedure; who can now measure the prejudice of that delay?

We pray this Honorable Supreme Court of the United States to deny the petition and to speak out at the time of denial, its reasons therefor. The case warrants it.

Respectfully submitted,

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Dated at Helena, Montana, September 14, 1940.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA.

No. 1659.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
a National Banking Corporation, *Plaintiff*,

vs.

C. M. BAIR, *Defendant*.

The motion for judgment on the pleadings by defendant came on regularly for hearing under Rule 40 (2) of this court. Briefs were duly submitted by counsel for the respective parties, and have been carefully considered by the court.

It seems to be a rule that a former judgment in an action between the same parties, tried upon its merits, upon the same subject matter, is a bar to another action on the same cause of action, but is no defense to a cause of action on the same subject matter accruing after the rendition of the former judgment. Jones *v.* City of Petaluma, 36 Calif. 230, cited in State *v.* Farinus, 9 N. W. 724, 28 Minn. 175. Also Takekawa *v.* Hole, 121 Pac. 296, 297, holding: "It can not be said that, upon the face of the record in the former case, the rights of the parties as to the modified agreement could have been or were adjudged."

It seems to the court that the facts in this case afford an example of a novation, and present a different cause of action arising out of the same subject matter; and so, the court being duly advised, and good cause appearing, the motion for judgment on the pleadings is hereby denied.

CHARLES N. PRAY,
Judge.

Filed Jan. 11, 1937. C. R. Garlow, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA.

No. 1659.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Corporation, *Plaintiff*,

vs.

C. M. BAIR, *Defendant*.

Sometime ago a motion for judgment on the pleadings was filed by defendant's counsel in the above entitled action. Arguments were made by counsel for the respective parties and voluminous briefs submitted, and at length an opportunity was found to peruse these briefs and examine the authorities cited, with the result, that the main transactions set forth in the complaint, in the opinion of the court, plainly disclosed a novation, requiring the court to deny the motion for judgment on the pleadings. This motion was based upon the admitted facts as shown by the pleadings. Later on the case was tried to the court without a jury, by stipulation of counsel, and, from consideration of the evidence resulting therefrom there does not appear to be any change in a material sense in the basic facts upon which the court determined the merits of the motion for judgment on the pleadings theretofore made. The outstanding facts in the case, which seem to be beyond dispute, are that the payment of ten thousand dollars and the giving of a new note to plaintiff by defendant was the consideration for the dismissal of the suit in Yellowstone County, Montana. The payment of the money, giving of the note and stipulation were simultaneous acts of the parties. The entry of a judgment of dismissal in the Yellowstone County suit at a later date in no particular altered the case, as the court understands it.

The supplemental brief filed herein June 30th, 1938, prompted by the appearance of Erie Railroad Company *v.* Tompkins, 82 L. Ed. 787, 58 Sup. Ct. Rep. 817, has been read by the court and considered in connection with the new

authority, the Montana cases cited, and the reply brief, and so far as the court can see the arguments heretofore made by counsel have not been changed in any important particular.

This case furnishes a notable instance of what can sometimes be accomplished by able and adroit counsel under the rules of pleading and practice in postponing the inevitable day of judgment, even under a state of facts, supported by authorities, that appear to be clear and convincing.

In the opinion of the court the plaintiff is entitled to judgment in its favor, and such is the order of the court. The findings of fact and conclusions of law submitted by plaintiff are hereby approved and adopted, and defendant is allowed an exception thereto.

CHARLES N. PRAY,
Judge.

Filed Sept. 10, 1938. C. R. Garlow, Clerk.

SECTIONS 9379 AND 9455, REVISED CODES OF MONTANA, 1935.

9379. *Powers of referee on the trial.* The trial by a referee of an issue of fact, or of an issue of law, may be brought on for hearing upon notice of the referee and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner as where the trial is by the court without a jury. The referee exercises, upon such a trial, the same power as the court to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to the summons or to the pleadings; to compel the attendance of witnesses by attachment; and to punish a witness for contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs, and otherwise to dispose of any questions arising upon the decision of the issue referred to him. The powers conferred by this section are exercised in like manner and upon

like terms as similar powers are exercised by the court upon a trial.

9455. *Proceedings to compel debtor to appear—in what cases he may be arrested—what bail may be given.* After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

"The present Code of Civil Procedure of the State of New York, in section 2459, provides that a judgment debtor or officer of a corporation, required to attend in its behalf, being a resident of the state or having an office within the state, for the regular transaction of business, in person, cannot be compelled to attend, at a place without the county wherein his residence or place of business is situated. This provision is a re-enactment of some of the language of section 292 of the Code of Civil Procedure of 1877; but it cannot be considered that such a provision is binding upon the United States court. If an execution could properly be issued to the United States marshal for the Eastern District

of New York, and an order for examination can be had within the territory over which the execution would run, then the order for examination would certainly be effective throughout the Eastern District of New York, and would include more than one county. It could hardly be said that, in adopting the procedure of the State Code, Congress had intended to limit the jurisdiction of the United States court in the extent of execution of its own process geographically, for the boundaries of the United States courts are defined by sections of the Revised Statutes creating the courts, and process runs accordingly. Further, the New York Code, providing that witnesses may be summoned, has given the United States courts, under the adoption of this section, authority to summon witnesses, and in civil cases, under the provisions of section 876 of the Revised Statutes (U. S. Comp. St. 1901, p. 667), subpoenas may run within 100 miles. The most that can be urged would be that inasmuch as the New York Code limits the running of subpoenas of the state courts in supplementary proceedings to a county throughout whose territory execution can be issued, by analogy the United States court could only subpoena witnesses to attend throughout the district over which the United States marshal has jurisdiction to levy an execution; but legislating by analogy from other statutes is hardly a function of the court, and inasmuch as the subpoenas of the United States courts are especially given authority within a radius of 100 miles, in civil cases, it does not seem that this court should limit the right of subpoena in a particular kind of case, because of similarity of legislation in the state of New York, when the New York statute is not expressly applicable."

Meyer *v.* Consolidated Ice. Co. (Circuit Court, E. D. N. Y.), 163 Fed. 400 at pp. 403-404.